

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

UNITED STATES OF AMERICA)	
)	
v.)	Criminal No. 95-236-A
)	
EXOLON-ESK COMPANY;)	Violation: 18 U.S.C. § 1001
WILLIAM H. NEHILL,)	
)	
Defendants.)	

THE UNITED STATES' PROPOSED JURY INSTRUCTIONS

The United States, by Trial Attorney Mark C. Boyland, respectfully requests the Court to include in its charge to the Jury the following general instructions, found in Edward J. Devitt et al., Federal Jury Practice and Instructions (4th ed. 1990), along with other instructions as may become appropriate during the course of the trial.

§ 12.01	Introduction to the Final Charge– Province of the Court and of the Jury
§ 12.03	Evidence Received in the Case– Stipulations, Judicial Notice, and Inferences Permitted
§ 12.04	Direct and Circumstantial Evidence
§ 12.05	Inferences From the Evidence
§ 15.01	Credibility of Witnesses– Generally
§ 16.06	"False"– Defined
§ 17.06	Motive– Explained
§ 17.08	Proof of Knowledge or Intent– Rule 404(b) Evidence
§ 18.01	Aiding and Abetting– Explained
§ 18.04	Personal Responsibility of A Corporate Agent

- § 18.05 Corporate Criminal Responsibility– Explained
- § 20.01 Verdict– Election of Foreperson– Duty to Deliberate– Unanimity– Punishment– Form of Verdict– Communication With the Court
- § 37.09 The Nature of the Offense Charged
- § 37.10 The Statute Defining the Offense Charged

The Government also respectfully requests the Court to include in its charge to the Jury the four attached special instructions.

Respectfully submitted,

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GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 1
THE ESSENTIAL ELEMENTS OF THE OFFENSE CHARGED

In order to sustain its burden of proof for the crime of making or using a false writing or document as charged in the indictment, the Government must prove the following three essential elements beyond a reasonable doubt:

One: That the defendants, Exolon-ESK Company ("Exolon") and William H. Nehill ("Nehill"), made or used a false writing or document containing a false statement, as detailed in the indictment;

Two: That in doing so, the defendants acted knowingly and willfully; and

Three: That the false statement was material to a matter within the jurisdiction of a department or agency of the United States.^{1/}

In order to find the defendants guilty, you must find that the Government has proven all three elements beyond a reasonable doubt.^{2/}

^{1/} Edward J. Devitt et al., Federal Jury Practice and Instructions § 37.11 (4th ed. 1990), amended to conform with the present state of law in the Fourth Circuit enumerating three elements which must be proven to establish a violation of 18 U.S.C. § 1001. See United States v. Arch Trading Co., 987 F.2d 1087, 1095 (4th Cir. 1993); United States v. Seay, 718 F.2d 1279, 1280 (4th Cir. 1983), cert. denied, 467 U.S. 1226 (1984).

^{2/} Until recently, the materiality of a false statement to a matter within the jurisdiction of a department or agency of the United States was a matter for the court to determine. See Arch Trading Co., 987 F.2d at 1095. However, the Supreme Court recently has ruled that the Constitution requires criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, particularly the issue of materiality in an 18 U.S.C. § 1001 case. See United States v. Gaudin, No. 94-514, 1995 WL 360212, *3-4 (U.S. June 19, 1995).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 2
"MAKES OR USES ANY FALSE WRITING OR DOCUMENT"– DEFINED

"The phrase "makes or uses any false writing or document" means to create, to bring into existence, or to submit or to file some type of form, report, or letter, of any kind, which is not true. A false statement or representation is an assertion which is untrue when made or when used and which is known by the person making it or using it to be untrue.^{3/} In this regard, the government need not prove that the defendants personally prepared the writing or document. It is sufficient to satisfy this element if you find that they caused the writing or document charged in the indictment to be used.^{4/}

³Devitt, supra note 1, § 37.12.

⁴1A Leonard B. Sand et al., Modern Federal Jury Instructions, ¶ 36.01, Instruction 36-18 (1995).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 3
ELEMENT TWO: "KNOWINGLY AND WILLFULLY"

To satisfy Element Two, the Government must prove beyond a reasonable doubt that the defendants, Exolon and Nehill, acted "knowingly and willfully." Knowledge, willfulness and intent involve the state of a person's mind. Rarely is direct proof available to establish the state of one's mind. This may be inferred from what he says or does: his words, his actions, and his conduct, as of the time of the occurrence of certain events. The intent with which an act is done is often more clearly and conclusively shown by the act itself, or by a series of acts, than by words or explanations of the act uttered long after its occurrence. Accordingly, intent, willfulness and knowledge usually are established by surrounding facts and circumstances as of the time the acts in question occurred, or the time the events took place, and the reasonable inferences to be drawn from them.^{5/} Therefore, knowledge of falsehood may be inferred from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him or where the defendant's conduct comprises a reckless disregard for the truth with a conscious purpose to avoid learning the truth.^{6/}

⁵See 1 Leonard B. Sand et al., Modern Federal Jury Instructions, ¶ 6.06, Instruction 6-17 (1995). See United States v. Hester, 880 F.2d 799, 802 (4th Cir. 1989)(quoting United States v. Abrams, 427 F.2d 86, 91 (2d Cir. 1970)).

⁶United States v. Greenberg, No. 87-5089, 1988 WL 21229, at **3 (4th. Cir. March 8, 1988)(attached as Exh. A). On an appeal from conviction under 18 U.S.C. § 1001, the Fourth Circuit upheld this jury instruction on scienter given by then-Chief District Judge Albert V. Bryan, Jr. See also United States v. Fowler, 932 F.2d 306, 317-18 (4th Cir. 1991)(holding "reckless disregard" sufficient to prove scienter in a mail fraud case); United States v. Spillane, 913 F.2d 1079, 1082 (4th Cir. 1990)(holding that "reckless disregard for the truth satisfies the scienter element of [18 U.S.C. § 922(g)(2), making false statements to a licensed firearms dealer]"). Other circuits have adopted the reckless disregard standard in Section 1001 cases. See, e.g., United States v. Puente, 982 F.2d 156, 159 (5th Cir. 1993)(holding that a defendant

(continued...)

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 4
ELEMENT THREE: JURISDICTION AND MATERIALITY

Under Element Three, you must find beyond a reasonable doubt that the false statement at issue here was material to a matter within the jurisdiction of a department or agency of the United States.^{7/} You should use the following definitions of "department" and "agency:" The term "department" means one of the executive departments enumerated in section [101] of Title Five of the United States Code. Section 101 of Title Five lists the Department of Defense, among others, as an executive department.^{8/} You should read the term 'agency' to include:

[A]ny department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest. . . .^{9/}

(...continued)

who signed a form without reading it evinced "a reckless disregard for the truth with the purpose to avoid learning the truth," and could not claim ignorance of what he signed)(cited in United States v. Shah, 44 F.3d 285 (5th Cir. 1995)(holding that where defendant was familiar with government contracting procedures and supplied information and his signature at various points throughout the contract, the jury could find that defendant "knowingly" made the false statement therein)); Arthur Pew Construction Co. v. Lipscomb, 965 F.2d 1559, 1576 (11th Cir. 1992); United States v. Jewell, 532 F.2d 697 (9th Cir. 1976); United States v. Thomas, 484 F.2d 909, 912-13 (6th Cir. 1973); United States v. Abrams, 427 F.2d 86, 91 (2d Cir. 1970).

^{7/}Cf. Gaudin, 1995 WL 360212 at *3 (citing Sullivan v. Louisiana, 113 S.Ct. 2078, 2080-81 (1993)).

^{8/}See 5 U.S.C. § 101 (1995).

^{9/}18 U.S.C. § 6 (1995). See also United States v. Lang, 766 F.2d 389, 394 (D. Md. 1991); Hubbard v. United States, 115 S.Ct. 1754, 1757-58 (1995)(holding the definitions in 18 U.S.C. § 6 of "department" and "agency" applicable to 18 U.S.C. § 1001).

A United States government department or agency acquires jurisdiction over information when it has the statutory authority either to request production of that information or to act upon it.^{10/}

Bear in mind that the parties have already stipulated that:

The Department of Defense is a "department" of the United States, and the Defense Logistics Agency and its subunit, the Defense National Stockpile Center, are "agencies" of the United States, within the meaning of 18 U.S.C. §1001. Statements contained in certifications submitted by defendants Exolon-ESK Company and William H. Nehill as part of their October 21, 1994 bid proposal for Aluminum Oxide Fused Crude, are matters within the jurisdiction of a department or agency of the United States, within the meaning of 18 U.S.C. §1001.^{11/}

It is not necessary for the Government to prove that the defendant[s] had actual knowledge that the false statement was to be utilized in a matter which was within the jurisdiction of an agency or department of the United States. It is sufficient to satisfy this element if you find that the false statement was made with regard to a matter within the jurisdiction of an agency of the United States.^{12/}

¹⁰Bryson v. United States, 396 U.S. 64, 71 (1969)("[a] statutory basis for an agency's request for information provides jurisdiction enough to punish fraudulent statements under § 1001"); United States v. Rogers, 466 U.S. 475, 479-80 (1984)(holding that an agency has jurisdiction within the meaning of § 1001 when it has authority to act upon the information); United States v. Holmes, 840 F.2d 246, 248 (4th Cir. 1988).

¹¹Stipulation of Exolon-ESK Co. dated July 6, 1995, ¶ 1; Stipulation of William H. Nehill dated June 27, 1995, ¶ 1.

¹²Sand, supra note 4, ¶ 36.01, Instruction 36-22. See also Bryson, 396 U.S. at 71 (holding that a statutory basis for an agency's request for information provides jurisdiction enough to punish fraudulent statements under 18 U.S.C. § 1001); Rodgers, 466 U.S. at 479 (deeming departments or agencies to have jurisdiction under 18 U.S.C. § 1001 when they have the power to exercise authority in a particular situation)(quoted in United States v. Lang, 766 F. Supp. 389, 394 (D. Md. 1991)).

A statement is material if it has a natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which it was addressed.^{13/} There is no requirement that the false statement influence or actually affect the decision making process of a department of the United States Government.^{14/} A statement is material if it could have influenced the agency's decisions or activities.^{15/} Therefore, it is not necessary to show that the Department of Defense, the Defense Logistics Agency, or the Defense National Stockpile Center were in fact misled,^{16/} nor is it necessary to show that there was any financial loss.^{17/}

¹³Sand, supra note 6, ¶ 36.01, Instruction 36-20. See Gaudin, 1995 WL 360212 (quoting Kungys v. United States, 485 U.S. 759, 770 (1988)).

¹⁴United States v. Norris, 749 F.2d 1116, 1121 (4th Cir. 1984).

¹⁵Model Criminal Jury Instructions for the Ninth Circuit, Instruction No. 8.20 (1991).

¹⁶Pattern Jury Instructions of the District Judges Association of the Fifth Circuit, Instruction No. 2.46 (1990); See Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit, Instruction No. 29 (1991).

¹⁷See United States v. Gilliland, 312 U.S. 86, 93 (1941); United States v. Goldberger & Dubin, P.C., 935 F.2d 501, 506 (2d Cir. 1991); United States v. Gafyczk, 847 F.2d 685, 691 (11th Cir. 1988); United States v. Campbell, 848 F.2d 846, 852 (8th Cir. 1988); United States v. Richmond, 700 F.2d 1183, 1188 (8th Cir. 1983); United States v. Hicks, 619 F.2d 752, 754-55 (8th Cir. 1980); United States v. Jones, 464 F.2d 1118, 1122 (8th Cir. 1972)(citing Gonzales v. United States, 286 F.2d 118 (10th Cir. 1960), cert. denied 365 U.S. 878 (1961)(quoted in United States v. Coastal Contracting & Eng'g Co., 174 F. Supp. 474, 480 (D. Md. 1959)).

Dated: July 24, 1995

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CERTIFICATE OF SERVICE

I certify that I caused copies of the United States' Proposed Jury Instructions to be delivered to Gordon A. Coffee, Esq., Winston and Strawn, 14 "L" Street, N.W., Washington, DC, and David Scott Bracken, Esq., Greenberg, Bracken and Tran, 709 Prince Street, Alexandria, Virginia 22314; and to be sent by Federal Express the 24th day of July 1995 to:

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